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Economic Analysis of Law:
Contemporary Issues in Tort and Contract Law

Professor Trebilcock

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18. See e.g. Michael J. Sandel, Liberalism and the Limits of Justice (Cambridge: Cambridge University Press, 1982); C.B. Macpherson, Democratic Theory (Oxford University Press, 1973) especially "Elegant Tombstones: A Note on Friedman's Freedom", pp. 143-156; Thomas Nagel, "Libertarianism Without Foundations", (1975) 85 Yale L. J. 136 (review of Nozick); Michael Walzer, Spheres of Justice (New York: Basic Books, 1983).

19. See Richard Posner, The Economics of Justice (Cambridge Mass.: Harvard Univ. Press, 1981).

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26. See Garett Hardin, "The Tragedy of the Commons", (1968) 162 Science 1243.

27. See e.g. Michael Jensen and William Meckling, "Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure", (1976) 3 J. of Financial Economics 305; Eugene Fama, "Agency Problems and the Theory of the Firm", (1980) 88 J. Pol. Ec. 288.

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41. For general reviews of law and economics, see Richard Posner, Economic Analysis of Law, op. cit.; Robert Cooter and Thomas Ulen, Law and Economics (Harper Collins, 1988).

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52. For an extended critique of communitarianism, see Stephen Macedo, Liberal Virtues (Oxford: Clarendon Press, 1990).

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55. See Michael Trebilcock, Marsha Chandler and Robert Howse, Trade and Transitions (London: Routledge, 1990), chap. 1.

56. See e.g. Francis Fukuyama, "The End of History?" and commentaries thereon, "The National Interest, Summer, 1989.

Endnotes

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2. *See* Michael Walzer, *Spheres of Justice*, 100-103 (1983). There may be other objections to privatizing public functions. *See, for example*, debates over plea bargaining: Robert Scott and William Stuntz, "Plea Bargaining as Contract," 101 *Yale Law Journal* 1909 (1992); ensuing comments by Frank Easterbrook, Stephen Schulhofer; and rejoinder by Robert Scott and William Stuntz.

3. John Stuart Mill, *On Liberty*, chap. V, para. 11 (1956), discussed below in Chapter 7 "Paternalism".

4. Margaret Jane Radin, "Market Inalienability," 100 *Harvard Law Review* 1849 (1989).

5. *See also* James Boyd White, "Economics and Law: Two Cultures in Tension," 54 *Tennessee Law Review* 161 (1987); Jay Feinman, "Critical Approaches to Contract Law," 30 *UCLA Law Review* 829 (1983).

6. For a somewhat analogous argument, *see* Fred Hirsch, *Social Limits to Growth* (1978) (especially chap. 6).

7. *See* Patrick Devlin, *The Enforcement of Morals* (1965).

8. Margaret Jane Radin, "Residential Rent Control," 15 *Philosophy and Public Affairs* 350 (1986). For an ensuing exchange, *see* Timothy Brennan, 17 *Philosophy and Public Affairs* 66 (1988); and Margaret Jane Radin, 17 *Philosophy and Public Affairs* 80 (1988).

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10. *See* Scott Altman, "(Com)modifying Experience," 65 *Southern California Law Review* 293 (1991).

11. Richard Titmuss, *The Gift Relationship: From Human Blood To Social Policy* (1970).

12. Arrow, "Gifts and Exchanges".

13. *See* Susan Rose-Ackerman, "Inalienability and the Theory of Property Rights," 85 *Columbia Law Review* 931, 947 (1985).

14. Eric Mack, "Dominoes and the Fear of Commodification," in *Markets and Justice*, 198 (J.R. Pennock and J.W. Chapman eds., 1989).

15. For an insightful discussion of the ambiguities inherent in the notion of self-interest, *see* Amartya Sen, *On Ethics and Economics* (1987).

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21. *See* Dennis Mueller, *Public Choice II*, chap. 20 (1989).

22. For an extended critique of communitarianism, *see* Stephen Macedo, *Liberal Virtues* (1990).

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25. Lloyd R. Cohen, "Increasing the Supply of Transplant Organs: The Virtues of a Futures Market," 58 *George Washington Law Review* 1, 5 (1989); *see also* Hansmann, "Market for Human Organs," 60.

26. Manitoba Law Reform Commission, *Human Tissue Report*, 24.

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30. William N. Gerson, "Refining the Law of Organ Donation: Lessons from the French Law of Presumed Consent," 19 *New York University Journal of International Law and Politics*

1013, 1027 (1987); Cohen, "Transplant Organs: Futures Market," 19.

31. Australian Law Reform Commission, *Human Tissue Transplants* (Report No.7) (1977).

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33. Ibid., 110.

34. Ibid.

35. Bernard Dickens, "Morals and Markets in Transplantable Organs," *Transplantation/Implantation Today* 29 (1990).

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40. Peter H. Schuck, "Government Funding for Organ Transplants," 14 *Journal of Health Politics, Policy and the Law* 169, 172 (1989).

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47. Ibid., 2.

48. Ibid., 28.

49. Hansmann, "Markets for Human Organs," 63.

50. Ibid., 65.

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54. Debra H. Berger, "The Infant with Anencephaly: Moral and Legal Dilemmas," 5 *Issues in Law and Medicine,* 67, 68 (1989).

55. Bauer, "Fetal Organ and Tissue Transplantations," 973.

56. Ibid., 971. (These are federal regulations adopted from the recommendations of the National Commission for the Protection of Human Subjects of Biomedical and Behavioural Research, formed immediately after the Roe v. Wade decision in 1973).

57. Berger, "The Infant with Anencephaly," 70.

58. Bauer, "Fetal Organ and Tissue Transplantations," 981.

59. Anencephalic babies are babies born with only a small fragment of a brain, and often with little or no skull covering. These babies die within hours or days. The organs of these babies, however, are healthy. *See* Berger, "The Infant with Anencephaly," 69.

60. Ibid., 80.

61. Ibid., 79.

62. John A. Robertson, "Fetal Tissue Transplants," 66 *Washington University Law Quarterly* 443, 465 (1988).

63. Ibid., 452.

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65. Ibid., 454.

66. Bauer, "Fetal Organ and Tissue Transplantations," 989.

67. Nicolas P. Terry, "Politics and Privacy: Refining the Ethical and Legal Issues in Fetal Tissue Transplantation," 66 *Washington University Law Quarterly*, 523, 529 (1988); *see also* Robertson, "Fetal Tissue Transplants," 455.

68. Histocompatibility is the compatibility between the grafted tissue and the recipient.

69. Robertson, "Fetal Tissue Transplants," 456.

70. Terry, "Politics and Privacy: Fetal Tissue Transplantation," 527-528.

71. Ibid., 528.

72. Bauer, *Fetal Organ and Tissue Transplantations*, 1003-1004.

73. Radin, "Market Inalienability," 1849, 1884 (1987).

74. Ibid., 1872-1873.

75. Ibid., 1881.

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79. Carole Pateman, *The Sexual Contract*, 194 (1988).

80. Catharine A. Mackinnon, *Toward a Feminist Theory of the State*, 243 (1989).

81. Ibid., 131.

82. Ibid., 130.

83. Jody Freeman, "The Feminist Debate Over Prostitution Reforms: Prostitutes' Rights Groups, Radical Feminists, and the (Im)possibility of Consent," 5 *Berkeley Women's Law Journal* 75, 78 (1990).

84. Canadian Criminal Code, R.S.C., chap. C-46, sec. 213(1) (1985) (Can).

85. Ibid., secs. 212(1)(a-i).

86. Ibid., sec. 210(1).

87. Ibid., secs. 212(1)(j) and 212(2).

88. Ibid., sec. 213.

89. Priscilla Alexander, "Prostitution: A Difficult Issue for Feminists," in *Sex Work: Writings by Women in the Sex Industry*, 189-190 (P. Alexander and F. Delacoste eds., 1987).

90. Ibid., 197. Forty percent of the prostitutes on the street are women of colour. Scibelli reports that a black woman is 22 times as likely as is a white woman to be arrested for prostitution: Pasqua Scibelli, "Empowering Prostitutes: A Proposal for International Legal Reform," 10 *Harvard Women's Law Journal* 117, 120 (1987).

91. Ministry of Supply and Services Canada, *Report of the Special Committee on Pornography and Prostitution: Pornography and Prostitution in Canada Vol. 2*, (Chair: Paul Fraser, 1985) [hereinafter *The Fraser Report*]..

92. For various estimates, *see* Alexander, "Prostitution: Difficult Issue for Feminists," 188; Christopher Bagley and Kathleen King, *Child Sexual Abuse: The Search for Healing* 118 (1990); Belinda M.M. Cheney, "Prostitution - a Feminist Jurisprudential Perspective," 18 *Victoria University of Wellington Law Review* 239, 243 (1988); Judith Enew, *The Sexual Exploitation of Children* 94 (1986); Jean Goodwin, *Sexual Abuse: Incest Victims and Their Families*, 4 (1982); Patricia Beezley Mrazek and C. Henry Kempe, *Sexually Abused Children and their Families* 230 (1981); *The Fraser Report*, 352.

93. Bagley and King, *Child Sexual Abuse*, 59-69; cite eleven studies from Britain, Canada, and the United States, reporting varying percentages of adult women who experienced some form of sexual abuse as children. The inconsistency can be attributed to the diverse populations used in each study, the formulation of the questions, the various definitions of sexual abuse which were employed, and the size of each sample.

94. Alexander, "Prostitution: Difficult Issue for Feminists," 200.

95. Richard Symanski, *The Immoral Landscape: Female Prostitution in Western Societies*, 62 (1981).

96. Cheney, "Prostitution - A Feminist Perspective," 243.

97. Moira Griffin, "Wives, Hookers and the Law," 10 *Student Lawyer*, 18, 20 (1982).

98. Belinda Cooper, "Prostitution: A Feminist Analysis," 11(2) *Women's Rights Law Reporter* 99, 112 (1989); *see also* Alexander and Delacoste, for anecdotes by prostitutes about "the life."

99. Freeman, "Feminist Debate over Prostitution Reforms," 90.

100. Cheney, "Prostitution - A Feminist Perspective," 253.

101. Ibid., 243.

102. Arlene Carmen and Howard Moody, *Working Women: The Subterranean World of Street Prostitution*, 16 (1985).

103. Scibelli, "Empowering Prostitutes," 132.

104. Alexander, "Prostitution: Difficult Issues for Feminists," 206.

105. Freeman, "Feminist Debate over Prostitution Reforms," 82.

106. *The Fraser Report*, Recommendation 55 at 534.

107. *The Fraser Report*, Recommendation 56 at 536 and Recommendations 59 and 60 at 543.

108. *The Fraser Report*, Recommendation 57 at 538 and Recommendation 61 at 546.

109. *The Fraser Report*, 683.

110. Ibid., 360.

111. In the famous English case of Pearce v. Brooks (1866) *Law Reports* 1 Ex. 213, a right of action was denied in analogous circumstances and presumably would have been denied if the parties' roles had been reversed.

112. Griffin, "Wives, Hookers and the Law".

113. Pateman, *The Sexual Contract*, 122.

114. Ibid.

115. Ibid., 124.

116. This section and the next (surrogacy) in this chapter are derived from Michael Trebilcock and Rosemin Keshvani, "The Role of Private Ordering in Family Law: A Law and Economics Perspective," 41 *University of Toronto Law Journal* 533 (1991).

117. See Nitya Duclos, "Breaking the Dependency Circle: The Family Law Act Reconsidered," 45 *University of Toronto Faculty of Law Review* 1, 4 (1987).

118. Law Reform Commission of Canada, *Report on Family Law*, 3 (1976).

119. Ibid., 35.

120. Family Law Act, S.O. chap.4, sec.5(1) (1986) (Can).

121. Ibid., secs. 33(8) and (9); *see also* Divorce Act, R.S.C. ch.4, sec.15(7)(d) (1986) (Can.).

122. Pelech v. Pelech 7 R.F.L. (3d) 225 (S.C.C. 1987).

123. *See* Robert Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," 88 *Yale Law Journal* 1015 (1979).

124. Ibid.

125. Katherine Baker, "Contracting for Security: Paying Married Women What They've Earned," 55 *University Chicago Law Review*, 1193 (1988); citing data from Linore Weitzman, *The Divorce Revolution* (1985).

126. Martha Minow, "Learning to Live With the Dilemma of Difference," 48 *Law and Contemporary Problems* 157 (1985); Martha Minow, *Making All the Difference* (1990).

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128. *See e.g.*, Brenda Cossman: "A Matter of Difference and Domestic Contracts and Gender Inequality," 28 *Osgoode Hall Law Journal* 303 (1990).

129. Duclos, "Breaking the Dependency Circle," 28-32.

130. *See e.g.*, Neil Komesar, "Toward a General Theory of Personal Injury Loss," 3 *Journal of Legal Studies* 457 (1974).

131. Baker, "Paying Married Women," 1225-26.

132. *See* Lloyd Cohen, "Marriage, Divorce, and Quasi-Rents; Or I Gave Him the Best Years of My Life," 16 *Journal of Legal Studies* 267 (1987).

133. *See* June Carbone and Margaret Brinig, "Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform," 65 *Tulane Law Review* 953 (1991).

134. *See* Ira Ellman, "The Theory of Alimony," 77 *California Law Review* 3 (1989); Stephen Sugarman, "Dividing Financial Interests on Divorce," in *Divorce Reform at the Cross-Roads* (Stephen Sugarman and Herman Hill Kay eds., 1990).

135. In Re Baby M, 109 N.J. 396, 537 A. ed. 1227 (S.C. New Jersey 1988).

136. In the United States every year there is an excess of 13,130 children in need of homes. The majority of these children are non-white and special needs. *See The World Almanac and Book of Facts - 1990* at 843 (1990). Although infertile couples should not be made to bear the burden of creating homes for these children, it might be argued that the recent attention paid to surrogate motherhood should remind fertile and infertile couples alike to give more thought to the welfare of these needy children.

137. Baby M, 1235.

138. For sympathetic views of the advantages of surrogacy, *see* C. Shalev, *Birth Power: The Case for Surrogacy* (1989); Lori Andrews, *Between Strangers* (1989); and Amy Overvold, *Surrogate Parenting* (1988).

139. For an overview of potential conflicts with the traditional conception of family, see Martha Field, *Surrogate Motherhood*, 33-45 (1988).

140. *See* Sacred Congregation for the Doctrine of the Faith, *Instruction on Respect of Human Life in its Origin and the Dignity of Procreation*, 39 (1987).

141. Arguments which derive purpose or telos from "nature" are often oppressive and should be viewed with caution. Consider the Social Darwinist justification for racial supremacy or slavery. Similarly, consider Aristotle's defence of slavery and the natural inferiority of women, *see* Aristotle, *Politics, Book I*. chaps. 2-7; The classic model and methodology of "natural law" comes from Aristotle who posited that man's correct nature and telos could be determined through rational reflection on the essential nature of the person, *see* Aristotle, *Posterior Analytics, Book II*, chap. 5.

142. *See generally* F.E. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform," 96 *Harvard Law Review* 1497 (1983); C. Backhouse, "Pure Patriarchy: Nineteenth Century Canadian Marriage," 31 *McGill Law Journal* 265 (1986); Shalev, *Birth Power,* 21-36; G. Greer, *The Female Eunuch*, 198-238 (1971); S. de Beauvoir, *The Second Sex* (1949).

143. *See* Shalev, *Birth Power*, 22, where she supports the argument that "adultery" is related not to the fact of sexual intercourse, but to the husband's right to "certainty of paternity", citing Orford v. Orford 49 *O.L.R.* 15, 23 (Ont. C.A. 1921) in which a married woman who conceived through artificial insemination was found to have committed adultery, thereby forfeiting her right to alimony.

144. *See* C. MacKinnon, "Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence," 8 *Signs* 635 (1982).

145. *See e.g.*, P. Chesler, *Sacred Bond* (1988); Radin, "Market Inalienability," 1849; E. Kane, *Birth Mother* (1988); T. Shannon, *Surrogate Motherhood* (1988); E.S. Anderson, "Is Women's Labor a Commodity?," 19 *Philosophy and Public Affairs* 71 (1990).

146. Anderson, "Women's Labour," 72-73.

147. *See, e.g.*, Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Womb* (1985).

148. *See* Field, *Surrogate Motherhood*, 26-9.

149. *See* Radin, "Market Inalienability".

150. Ibid.

151. *See* Richard Arneson, "Commodofication and Commercial Surrogacy," 21 *Philosophy and Public Affairs* 132 (1992).

152. S. Sherwin, "Feminist Ethics and In Vitro Fertilization," 13 *Canadian Journal of Philosophy* 265, 299 (1987); where it is argued that surrogacy in practice would amount to exploitation of poor, under-educated and emotionally unstable women; *see also* Debra Satz, "Markets in Women's Reproductive Labour," 21 *Philosophy and Public Affairs* 107 (1992); for a critique of this view, *see* Alan Wertheimer, "Two Questions About Surrogacy and Exploitation," 21 *Philosophy and Public Affairs* 211 (1992).

153. Shalev, *Birth Power*, 164; for a Marxist argument to similar effect, *see* J. Ollengburger and J. Hamlin, "All Birthing Should be Paid Labour," in *On the Problem of Surrogate Parenthood* (H. Richardson ed., 1987).

154. For a feminist argument that such freedom should be recognized, *see* Lori Andrews, "Surrogate Motherhood: The Challenge for Feminists," 16 *Law Medicine and Health Care* 72 (1988).

155. *See* P. Schuck, "Some Reflections on the Baby M Case," 76 *Georgetown Law Journal* 1793, 1795 (1988).

156. Umited Kingdom, Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilization and Embryology* Cmnd 9314 in Sessional Papers at 46-7 (Chair: Dame Mary Warnock (July 1984); *see also* J.R.S. Prichard, "A Market for Babies?," 34 *University Toronto Law Journal* 341

(1984).

157. E. Mack, "Dominos and the Fear of Commodification," in *Markets and Justice,* 217 (J.W.Chapman and J.R. Pennock eds., 1989) [emphasis added].

158. For studies on the empirical question of "bonding", *see Reports of Phyllis R. Silverman*, (Professor of Social Work in Health Care, Massachusetts General Hospital Institute of Health Professionals), for use in the Baby M litigation, October 23, 1986, which finds birth mothers greatly underestimate the degree of grief they will feel from giving up the child -- 95% of them felt it was worse than they had ever imagined; *see also* Leverett Millen and Samuel Roll, "Solomon's Mothers: A Special Case of Pathological Bereavement," 55 *American Journal of Orthopsychiatry* 2 (1985), in which it is found that birth mothers experience anguish as much as 20 years later; and *see also* Vicki C. Jackson, "Baby M and The Question of Surrogate Parenthood," 76 *Georgetown Law Journal* 1811, 1821 (1988), in which she cites numerous studies establishing that many birth mothers severely underestimate the emotional trauma resulting from giving up the child; *see also* Kane, *Birth Mother; but cf.* Schuck, "Reflections on Baby M" 1799 (Schuck argues that "[t]he risk of subsequent regret is the price we pay for our commitment to personal autonomy and responsibility in the face of uncertainty").

159. Field, *Surrogate Motherhood*, 27: "... to portray surrogacy contracts as representing meaningful choice and informed consent ... reveals an idealized perspective and a failure to take account of realities"; *but cf.* Schuck, "Reflections on Baby M," 1800 (Schuck argues that "a choice is not morally unacceptable simply because it is constrained or even because some choosers are more constrained than others ... constraint is what makes choices problematic -- and thus morally relevant -- in the first place.")

160. *See* M. Seidman, "Baby M and The Problem of Unstable Preferences," 76 *Georgetown Law Journal* 1829, 1933 (1988): where he suggests that if we are serious about controlling externalities, surrogate parenting may not be an appropriate place to start. Taken to its logical conclusion, the regulatory approach may well mandate the establishment of administrative agencies to oversee childbearing and child-rearing questions generally; *see also*, J. Areen, "Baby M Reconsidered," 76 *Georgetown Law Journal* 1741, 1758 (1988), where she suggests that because a child conceived through surrogacy is produced precisely for the purpose of being adopted, this may create a set of relationships fraught with peril - specifically the child may view him or herself as a commodity; *see also* Radin,"Market Inalienability," where she

argues that allowing for the commodification of children would inevitably alter our perception and valuation of them; *see also* B.K. Rothman, *The Tentative Pregnancy*, 28 (1986), in which she suggests that reproductive technologies, including surrogate motherhood, are the first step toward a "developing ideology [in which] we are learning to see our children as products, the products of conception"; *see also* Anderson, "Women's Labour".

161. Radin, "Market Inalienability".

162. *See* Ontario Law Reform Commission *Report on Human Artificial Reproduction*, 232 (1985).

163. *See* Field, *Surrogate Motherhood*, 139, for an argument that precise rules determining custody are to be preferred, in the case of surrogacy, in order to avoid the negative effects on the child; and *see also*, Baby M, 1247, where Wilentz, C.J., suggests that the real failure with surrogacy contracts is: "A child, instead of starting off its life with as much peace and security as possible, finds itself immediately in a tug-of-war between contending mother and father"; *but cf.* M. Garrison, "Surrogate Parenting: What Should Legislatures Do?," 22 *Family Law Quarterly* 149, 157 (1988); (Garrison argues against the need for a clear rule on the custody question, suggesting surrogacy be treated no differently different from other forms of custody disputes.)

164. *See Ontario Law Reform Commission, Report on Human Artificial Reproduction*, 236-261 (1985).

165. Field, *Surrogate Motherhood*, 151-152.

166. *See* Richard A. Posner, *Sex and Reason* 422-423 (1992).

167. Ronald Coase, "The Problem of Social Costs," 3 *Journal of Law and Economics* 1 (1960).

168. Field, *Surrogate Motherhood*.

169. Ibid., 97-109.

170. Daigle v. Tremblay (1989) 2 S.C.R. 530 (S.C.C. Can.).

171. This position parallels the present laws respecting AID, in which the biological father does not possess legal rights with respect to the child.

172. *See e.g.*, Wanda Wiegers "Economic Analysis of Law and Private Ordering: A Feminist Critique," 42 *University of Toronto Law Journal* 170 (1992).

Endnotes

1. *See* Guido Calabresi, "The Pointlessness of Pareto: Carrying Coase Further," 100 *Yale Law Journal* 1211 (1951).
2. Carl J. Dahlman, "The Problem of Externality," 22 *Journal of Law and Economics* 141 (1979).
3. J.M. Buchanan and W.C. Stubblebine, "Externality," 29 *Economica* 37 (1962).
4. Dahlman, "The Problem of Externality," 155-156.
5. Ronald Coase, "The Problem of Social Cost," 11 *Journal of Law and Economics* 1 (1960).
6. Harold Demsetz, "Information and Efficiency: Another Viewpoint," 12 *Journal of Law and Economics* 55 (1969).
7. E.J. Mishan, "The Effect of Externality on Individual Choice," 73 *International Review of Law and Economics* 97 (1981); *see also* E.J. Mishan "The Post-War Literature on Externalities: An Interpretive Essay," 9 *Journal of Economic Literature* 1 (1971).
8. Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral," 85 *Harvard Law Review* 1089 (1972).
9. John Stuart Mill, *On Liberty*, chap. 1, para. 9 (1859).
10. *See* John Gray, *Liberalism*, 53, 54 (1986),
11. Joel Feinberg, *Harm to Others* (1984); Joel Feinberg, *Offense to Others,* (1986); Joel Feinberg, *Harm to Self,* (1986); Joel Feinberg, *Harmless Wrongdoing,* (1988).

12. Feinberg, *Harm to Others*, 12.

13. Feinberg, *Offense to Others*, 1.

14. Feinberg, *On Liberty*, chap. 6, para. 12.

15. Feinberg, *Offense to Others*, 10-13.

16. Ibid., chap. 8.

17. Ibid., chap. 9.

18. Feinberg, *Harmless Wrongdoing*, chaps. 28, 29, 30.

19. Patrick Devlin, *The Enforcement of Morals* (1965).

20. H.L.A. Hart, "Immorality and Treason," in *Morality and the Law* (Richard A. Wasserstrom ed., 1971); *more generally*, H.L.A. Hart, *Law, Liberty and Morality* (1963).

21. *See* Jeremy Waldron, "Mill and the Value of Moral Distress," 25 *Political Studies* 410 (1987); Anthony Ellis, "Offense and the Liberal Conception of Law," 13 *Philosophy and Public Affairs* 3 (1984); Ronald Dworkin, "Do We Have a Right to Pornography?," in Dworkin, *A Matter of Principle,* chap. 17 (1985).

22. R. v. Butler 134 N.R. 81 (S.C.C. 1992) (Can.).

23. *See* Pierre Schlag, "An Appreciative Comment on *Coase's Problem of Social Cost: A View from the Left,*" (1986) *Wisconsin Law Review* 919; Duncan Kennedy, "Cost-Benefit Analysis of Entitlement Problems: A Critique," 33 *Stanford Law Review* 387 (1981).

24. Feinberg, *Offense to Others*, chap. 11.

25. United States, Attorney General's Commission on Pornography, *Attorney General's Commission on Pornography* (1986).

26. *See* e.g., Edward Donnerstein and Daniel Linz, *The Question of Pornography* (1987); H.B. McKay and D.J. Dolff, "The Impact of Pornography: An Analysis of Research and Summary Findings," Background Study to the Report of the Special Committee on Pornography and Prostitution in Canada, (1986); Richard Posner, *Sex and Reason*, 366-371 (1992).

27. Butler1.

28. *See* Robin West, "Taking Preferences Seriously," 64 *Tulane Law Review* 659 (1990) (on the Georgia anti-sodomy statute).

29. Butler, 141.

30. *See* McKay and Dolff, "The Impact of Pornography".

31. Catharine Mackinnon, *Feminism Unmodified: Discourses on Life and Law*, 140 (1987).

32. Andrea Dworkin, *Pornography: Men Possessing Women* (1989).

33. Caryn Jacobs, "Patterns of Violence: A Feminist Perspective on the Regulation of Pornography," 7 *Harvard Women's Law Journal* 41 (1986).

34. Mackinnon, Catharine, *Toward a Feminist Theory of the State* 204 (1989).

35. Ibid.

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37. Mackinnon, *Feminism Unmodified*, 140.

38. Jacobs, "Patterns of Violence," 45.

39. Mackinnon, *Feminism Unmodified*, 193.

40. Dworkin, *Pornography: Men Possessing Women* 2.

41. Ibid., 13.

42. Cass Sunstein, "Pornography and the First Amendment," 4 *Duke Law Journal* 589, 597 (1986).

43. Ibid., 603-04.

44. Ibid., 601; Deana Pollard "Regulating Violent-Pornography," 43 *Vanderbilt Law Journal* 130 (1990).

45. Mackinnon, "^Toward A Feminist Theory," 207.

46. Ibid., 208.

47. *See also* Ruth Colker, "Pornography and Privacy: Towards the Development of a Group-Based Theory for Sex-Based Intrusions of Privacy," 1 *Law and Inequality Journal* 198 (1983).

48. Christina Spaulding, "Anti-Pornography Laws as a Claim for Equal Respect: Feminism, Liberalism & Community," 4 *Berkeley Women's Law Journal* 128, 136 (1989).

49. Ibid., 161.

50. Ibid., 142.

51. Ibid., 143.

52. *See* Jacobs, "*Patterns of Violence,*" 17; Alice Walker, "Coming Apart," in *Take Back the Night* (Laura Lederer, ed., 1980); Luisah Teish, "A Quiet Subversion," in Lederer, *Take Back the Night*.

53. Charlotte Burch, "Lesbianism and Erotica in Pornographic America," in Lederer, *Take Back the Night*.

54. David Dyzenhaus, "Liberalism, Pornography, and the Rule of Law," in *Canadian Perspectives on Legal Theory* (Richard R. ed., 1991); *see also* Kathleen Mahoney, "The Limits of Liberalism," in Devlin, *Canadian Perspectives*, *see more*

generally, David Dyzenhaus, "Liberalism, Autonomy and Neutrality," 42 *University of Toronto Law Journal* 354 (1992).

55. *See also* Rae Langton, "Whose Right? Dworkin, Women and Pornographers," 19 *Philosophy and Public Affairs* 311 (1990).

56. David Dyzenhaus, "John Stuart Mill and the Harm of Pornography," (1991) (mimeo, University of Toronto Law School).

57. Marianna Valverde and Lorna Weir, "Thrills, Chills, and the Lesbian Threat, or the Media, the State and Women's Sexuality," in *Women Against Censorship* (Vanda Burstyn ed., 1985).

58. *See* MacKinnon, *Feminism Unmodified*, 177.

59. Such an ordinance was struck down as unconstitutional in American Booksellers Assn. v. Hudnut 771 F. 2d. 323 (7th Circ. 1985).

60. *See* Feinberg, *Harm to Self*, 22.

61. See André Raynault and Jean-Pierre Vidal, "Smokers' Burden on Society: Myth and Reality in Canada," 18 *Canadian Public Policy* 300 (1992).

62. Calabresi and Melamed, "One View of the Cathedral".

63. *See* Chet Mitchell, "Regulative Drug Taxes and Tax Rates: Politics, Efficiency, or Justice," Law and Economics Workshop Paper, University of Toronto Law School, (September 26, 1990).

64. Reference re ss. 193 and 195. 1(1)(c) of the Criminal Code 1 S.C.R. 1123 (S.C.C. Can.) "The Prostitution Reference".

65. R. v. Keegstra 1990 3 S.C.R. 697 (S.C.C. Can.).

66. However, in a later case, Zundel v. R. (1992, unreported), a majority of the Supreme Court of Canada struck down provisions in the Canadian Criminal Code (p. 181) that made it a criminal offence for anyone wilfully to spread news that he knows is false, and causes or is likely to cause injury or mischief to a public interest, on the grounds that these violated constitutional guarantees of freedom of expression (s. 2(b)) and were not justified under s. 1. The accused had been charged under s. 181 for disseminating anti-semitic literature alleging that the Holocaust was a myth.

67. David Dyzenhaus, "Regulating Free Speech" (1991) (mimeo, University of Toronto Law School).

Endnotes

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2. *See* C.B. MacPherson, "Elegant Tombstones," in McPherson *Democratic Theory: Essays in Retrieval*, 143 (1973).

3. Alan Wertheimer, "Coercion," 10 (1987).

4. Robert Nozick, "Coercion," in *Philosophy, Science and Method* (Sidney Morgenbesser et al eds., 1969).

5. Charles Fried, *Contract as Promise*, chap. 7. (1981),

6. Joel Feinberg, *Harm to Self,* chaps. 23, 24. (1986).

7. Wertheimer, *Coercion*, 450.

8. Ibid., 207.

9. Nozick, "Coercion," 450.

10. Fried, *Contract as Promise,* 96, 97.

11. Ibid., 98, 99.

12. David Zimmerman, "Coercive Wage Offers," 10 *Philosophy and Public Affairs* 121, 122 (1981).

13. *See* Wertheimer, *Coercion*, Part Two; Feinberg, *Harm to Self* for reviews of these debates and citations to the extensive literature.

14. For an excellent review of these debates, *see* James Boyle, "A Theory of Law and Information," in Boyle, *Critical Legal Studies* (forthcoming); *see also* James Lindgren, "Unravelling the Paradox of Blackmail," 84 *Columbia Law Review* 670 (1984); James Lindgren, "Blackmail: On Waste, Morals and Ronald Coase," 36 *UCLA Law Review* 597 (1989); Lindgren, "In Defense of Keeping Blackmail a Crime," 20 *Loyola of Los Angeles Law Review* 35 (1986); Richard Epstein, "Blackmail Inc.," 50 *University of Chicago Law Review* 553 (1983); Ronald Coase, "Blackmail," 74 *Virginia Law Review* 665 (1988); W. Black and D. Gordon, "Blackmail, Extortion and Free Speech," 19 *Loyola of Los Angeles Law Review* 37 (1985).

15. Peter Benson, "Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory," 10 *Cardozo Law Review* 1077 (1989).

16. James Gordley, "Equality in Exchange," 69 *California Law Review* 1587 (1981).

17. The tenability of a distinction between substantive and procedural fairness is critically examined by Arthur Leff in his widely-cited article, "Unconscionability and the Code: The Emperor's New Clause," 115 *University of Pennsylvania Law Review* 485 (1967).

18. Anthony Kronman, "Contract Law and Distributive Justice," 89 *Yale Law Journal* 472 (1980).

19. Benson, "Hagel and Contemporary Contract Theory," 1119-1146.

20. Frank Buckley, "Three Theories of Substantive Fairness," 19 *Hofstra Law Review* 33 (1990).

21. Randy Barnett, "A Consent Theory of Contract," 86 *Columbia Law Review* 269, 280-281 (1986).

22. The issue of actual or hypothetical consent presents a distinctive set of problems in arguably incomplete contracts: see Chapter 5 "*Asymmetric Information Imperfections*".

23. *See* Timothy J. Brennan, "Voluntary Exchange and Economic Claims," 7 *Research in the History of Economic Thought and Methodology* 105, 12 (1990).

24. *See* Jules Coleman, *Markets, Morals, and the Law*, Chap. 4. (1988); and Richard Craswell, "Efficiency and Rational Bargaining in Contractual Settings," 15 *Harvard Journal of Law and Public Policy* (forthcoming in 1992).

25. *See* Richard Epstein, "Unconscionability: A Critical Reappraisal," 18 *Journal of Law and Economics* 243, 296 (1975).

26. Feinberg, "Harm to Self," 246 and 248: (Feinberg takes the position that where A merely exploits but does not create B's vulnerability, B's consent is not invalidated.)

27. Fried, *Contract as Promise*, 109-110.

28. *See* William Landes and Richard Posner, "Salvors, Finders, Good Samaritans and Other Rescuers: An Economic Study of Law and Altruism," 7 *Journal of Legal Studies* 82 (1978).

29. Alaska Packers Assn. v. Domenico 117 F. 99 (9th Circ. 1902).

30. *See more generally* V. Aivazian, M.J. Trebilcock, and M. Penny, "The Law of Contract Modifications: The Uncertain Quest for a Bench-Mark of Enforceability," 22 *Osgoode Hall Law Journal* 173 (1984); Richard Posner, "Gratuitous Promises in Economics and Law," 6 *Journal of Legal Studies* 411 (1977).

31. *See* Robert Nozick, *Anarchy, State, and Utopia* 180 (1974).

32. F.A. Hayek, *The Constitution of Liberty,* 135-136 (1980); discussed by Harold Demsetz, "The Meaning of Freedom," in Demsetz. *Ownership, Control and the Firm* (1988).

33. Fried, *Contract as Promise*, 95.

34. Hayek, *The Constitution of Liberty*.

35. Landes and Posner, "Salvors, Finders, Good Samaritans".

36. Post v. Jones 60 U.S. 150 (1856).

37. *See* Grant Gilmore and Charles Black, *The Law of Admiralty*, chap. 8 (2d. ed. 1975); Landes and Posner, "Salvors, Finders, Good Samaritans".

38. Daniel Kahneman, Jack Knetsch and Richard Thaler, "Fairness as a Constraint on Profit-Seeking: Entitlements in the Market," 76 *American Economic Review* 728, 729 (1986).

39. Wertheimer, *Coercion*, 10, 225. 229 (originally from Feinberg).

40. Fried, *Contract as Promise*, 104.

41. *See* Henningsen v. Bloomfield Motors Inc. 32 N.J. 358, 161 A. (2a) 69 (1960).

42. *See* Alan Schwartz, "Unconscionability and Imperfect Information: A Research Agenda," 19 *Canadian Business Law Journal* 437, 454-455 (1991).

43. *See* Gordon Tullock, "The Welfare Costs of Tariffs, Monopolies and Theft," 5 *Western Economics Journal* 224 (1987); Richard Posner, "The Social Costs of Monopoly and Regulation," 83 *Journal of Political Economy* 807 (1975).

44. Kahneman, Knetsch, and Thaler, "Entitlements in the Market," 729, 730.

45. *See* Lon Fuller, "The Form and Limits of Adjudication," 92 *Harvard Law Review* 352 (1978).

46. Mitchell Polinsky and Steven Shavell, "The Optimal Trade-Off Between the Probability and Magnitude of Fines," *American Economic Review* 880 (1979).

47. Fried, "Contract as Promise," 104.

48. McPherson, "Elegant Tombstones".

49. Milton Friedman, *Capitalism and Freedom* (1962).

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51. Margaret Jane Radin, "Market Inalienability," 100 *Harvard Law Review* 1849 (1989) (*see* Chapter 2 "*Commodification*").

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3. *See* George J. Stigler, "The Economics of Information," 69 *Journal of Political Economy* 213 (1961).

4. Anthony Kronman, "Contract Law and Distributive Justice," 89 *Yale Law Journal* 472, 498 (1980).

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6. *See* Richard Craswell, "Interpreting Deceptive Advertising," 65 *Boston University Law Review* 657 (1985); Richard Craswell, "Regulating Deceptive Advertising," 64 *Southern California Law Review* 549 (1991).

7. *See* William Bishop, "Negligent Misrepresentation Through Economists' Eyes," 96 *Law Quarterly Review* 360 (1980).

8. *See* Ernest Weinrib, "Understanding Tort Law," 23 *Valparaiso University Law Review* 485 (1989).

9. For a review of legal doctrine in the common law, *see* Stephen Waddams, "Pre-contractual Duties of Disclosure," in *Essays for Patrick Atiyah* (P. Cane and J. Stapleton eds., 1991); for a review of legal doctrine in civil law systems, *see* Pierre Legrand, "Information in Formation of Contracts: A Civilian Perspective," 19 *Canadian Business Law Journal* 318 (1991).

10. Anthony Kronman, "Mistake, Disclosure, Information and the Law of Contracts," 7 *Journal of Legal Studies* 1 (1979).

11. Fried, *Contract as Promise*, 58-67.

12. Kronman, "Contract and Distributive Justice".

13. Scheppel, *Legal Secrets*.

14. Laidlaw v. Organ 15 U.S. (2 Wheat.) 178 (1817).

15. Strong v. Repide 213 U.S. 419, 29 S.Ct. 521 (1909).

16. Dyke v. Zaiser 80 Cal. App. 2d. 639, 182 P.2d. 344 (1947).

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20. *See* John Harsanyi, "Can the Maximin Principle Serve as the Basis for Morality? A Critique of John Rawls' Theory," 69 *American Political Science Review* 594 (1974).

21. George Akerlof, "The Market for Lemons: Quality Uncertainty and the Market Mechanism," 84 *Quarterly Journal of Economics* 488 (1970).

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28. Melvin Eisenberg, "The Bargain Principle and its Limits," 95 *Harvard Law Review* 741 (1982).

29. Lloyds Bank Ltd. v. Bundy [1975] 1 Q.B. 326.

30. *See* Don Dewees and Michael Trebilcock, "Judicial Control of Standard Form Contracts," in *An Economic Approach to Law*, chap. 4 (P. Burrows and C.G. Veljanovsky eds., 1981).

31. *See e.g.*, Friedrich Kessler, "Contracts of Adhesion: Some Thoughts About Freedom of Contract," 43 *Columbia Law Review* 629 (1943); Todd D. Rakoff, "Contracts of Adhesion: An Essay in Reconstruction," 96 *Harvard Law Review* 1173 (1983); David Slawson, "Standard Form Contracts and Democratic Control of Law Making Power," 86 *Harvard Law Review* 529 (1971).

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33. *See also* Alan Schwartz and Louis Wilde "Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis," 127 *University of Pennsylvania Law Review* 630 (1979).

34. *See* Avery Katz, "The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation," 89 *Michigan Law Review* 215, 287 (1990).

35. Buckley suggests that in some such cases, courts may be more efficient "screeners" of contract terms than some "consumers": Frank Buckley, "Three Theories of Substantive Fairness," 19 *Hofstra Law Review* 33 (1990), although Craswell is more sceptical of the ability of the courts to select superior terms to those selected by sellers: *see* Richard Craswell, "Property Rules and Liability Rules in ^Unconscionability and Related Doctrines," (September 27, 1992) (mimeo)

36. In other words, the problem is one of market failure, not transaction-specific contracting failure: *see* Arthur Allen Leff, "Contract as a Thing," 19 *American University Law Review* 131 (1970); and Alan Schwartz, "Unconscionability and Imperfect Information: A Research Agenda," 19 *Canadian Business Law Journal* 437 (1991).

37. Richard Craswell, "Contract Law, Default Rules, and the Philosophy of Promising," 88 *Michigan Law Review* 489 (1989).

38. Randy Barnett, "Sound of Silence: Default Rules and Contractual Consent," 78 *Virginia Law Review* 821 (1992).

39. Barnett, "Sound of Silence", 906.

40. David Charny, "Hypothetical Bargains: the Normative Structure of Contract Interpretation," 89 *Michigan Law Review* 1815 (1991).

41. Ian Ayres and Robert Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules," 99 *Yale Law Journal* 87 (1989).

42. Hadley v. Baxendale 156 E.R. 145 (1854).

43. Jason Johnston, "Strategic Bargaining and the Economic Theory of Contract Default Rules," 100 *Yale Law Journal* 615 (1990).

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45. For an accessible account of basic elements of game theory, and a balanced assessment of its insights and limitations, *see* David Kreps, *Game Theory and Economic Modelling* (1990); *see also* David Kreps, *A Course in Microeconomic Theory*, Part III (1990).

46. Samuel Rea, "Arm-Breaking, Consumer Credit and Personal Bankruptcy," 22 *Economic Inquiry* 188 (1984).

47. Philippe Aghion and Benjamin Hermalin, "Legal Restrictions on Private Contracts Can Enhance Efficiency," 6 *Journal of Law, Economics, and Organization* 381 (1990).

48. *See* Akerlof, M. Rothchild and J. Stiglitz, "Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information," 90 *Quarterly Journal of Economics* 629 (1976); C. Wilson, "A Model of Insurance Markets with Incomplete Information," 16 *Journal of Economic Theory* 167 (1977).

49. Samuel Rea, *Ontario Economic Council Disability Insurance and Public Policy*, 36 (1981).

50. William Bishop, "Is He Married? Marriage as Information," 34 *University of Toronto Law Journal* 245 (1984).

51. *See* Ayres and Gertner, "Filling Gaps in Incomplete Contracts," 91.

52. *See* Charles Lindblom, "The Science of 'Muddling Through'," 19 *Public Administrative Review* 79 (1959).

Endnotes

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4. Baird, "Self-Interest and Cooperation in Contracts," 596.

5. *See* Richard Craswell, "Contract Law, Default Rules, and the Philosophy of Promising," 88 Michigan Law Review 489 (1989); Randy Barnett, "The Sound of Silence: Default Rules and Contractual Consent," 78 *Virginia Law Review* 821 (1992); David Charny "Hypothetical Bargains: The Normative Structure of Contract Interpretation," 89 *Michigan Law Review* 1815 (1991); *see* Chapter 5 "Asymmetric Information Imperfections".

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22. *See* Sykes, "Commercial Impracticability in a Second-Best World"; Baird "Self-Interest and Cooperation in Contracts"; Robert Scott, "A Relational Theory of Default Rules for Commercial Contracts," 19 *Journal of Legal Studies* 597 (1990).

23. *See* Triantis, "Unknown Risks and Doctrine of Excuse"; Baird, "Self-Interest in a Second-Best World"; Scott "Default Rules for Commercial Contracts", Michelle White also argues that all cases involving unperformed contracts should be treated as breach cases attracting damages, but that the damages should be varied depending on the relative degrees of risk aversion of the parties: Michele White, "Contract Breach and Contract Discharge Due to Impossibility: A Unified Theory," 17 *Journal of Legal Studies* 353 (1988). However, this approach, by requiring determinations of relative degrees of risk aversion on a case-by-case basis would seem to raise many of the same operational problems as that of Posner and Rosenfield.

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27. Aivazian, Trebilcock, and Penny, "The Law of Contract Modifications".

28. *See* Alaska Packers Assn. v. Domenico 117 F.99 (9th Circ. 1902)

29. Oliver E. Williamson, *Markets and Hierarchies,* 29 (1975).

30. *See*eu King v. Duluth, Missabe and Northern Rly Co. 61 Minn. 482, 63 N.W. 7105 (1985) (holding such a modification to be unenforceable).

31. *See* Linz v. Schuck 106 Md. 220, 67 A. 286 (1907) (holding a modification in these circumstances to be enforceable)

32. Sherwood v. Walker 66 Mich. 568, 33 N.W. 919 (Mich. S.C. 1887).

33. For a game theoretic analysis of Sherwood v. Walker and other cases of mistake, *see* Ian Ayres and Eric Rasmussen, "Mutual and Unilateral Mistake in Contract Law," (Stanford Law School Working Paper in Law and Economics, No. 95, (June 1992).

34. Ian R. Macneil, "Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law," *Northwestern University Law Review* 854, 905 (1978).

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36. Fried, *Contract is Promise*, 69-74.

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41. *See* Triantis "Unknown Risks and Doctrine of Excuse" 46, 47; Thomas Jackson, "The Fresh Start Policy in Bankruptcy Law," 98 *Harvard Law Review* 1393 (1985).

42. *See also* Michael Walzer, *Spheres of Justice*, (1983).

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44. A point brilliantly demonstrated by Craswell, "Contract Law, Default Rules".

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47. *See* White, "Contract Breach and Discharge Due to Impossibility".

48. *See* Daniel Kahneman, Jack Knetsch, and Richard Thaler, "Experimental Tests of the Endowment Effect and the Coase Theorem," 98 *Journal of Political Economy* 1325 (1990); J. Knetsch, "The Endowment Effect and Evidence of Non-Reversible Indifference Curves," 79 *American Economic Review* 1277 (1989).

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2. For recent reviews, *see* Richard Craswell, "Contract Law, Default Rules and the Philosophy of Promising," 88 *Michigan Law Review* 489 (1989); Randy Barnett, "A Consent Theory of Contract," 86 *Columbia Law Review* 259 (1986); Frank Buckley "Paradox Lost," 72 *Minnesota Law Review* 775 (1988); Peter Benson, "Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory," 10 *Cardozo Law Review* 1077 (1989).

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4. Craswell, "Contract Law, Default Rules," 505-508.

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10. Both these difficulties are noted by Barnett, "A Consent Theory of Contract".

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52. Eisenberg, "The Bargaining Principle," 665.

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1. John Stuart Mill, *On Liberty*, 13 (1956).

2. Joel Feinberg, *Harm to Self*, 113 (1986).

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5. Margaret Jane Radin, "Market Inalienability," 100 *Harvard Law Review* 1849 (1989).

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41. *See e.g.*, Margaret Jane Radin, "Market Inalienability," 100 *Harvard Law Review* 1849 (1989).

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2. *See* M.J. Trebilcock, M.A. Chandler and R. Howse, *Trade and Transitions*, 3 (1990).

3. *See The Economist*, March 3, 1990, 17, March 30th, 1991, 17.

4. *See* Leroy Clark, "Comment," 79 *Georgetown Law Journal*, 1695, 1701 (1991); *see generally*, Andrew Hecker *Two Nations: Black and White, Separate, Hostile, Unequal* (1992).

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18. *See* Mary Becker, "Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment," 79 *Georgetown Law Journal* 1659 (1991).

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21. *See* Gary Becker, *The Economics of Discrimination* (1957).

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23. *See* Posner, "Sex Discrimination Laws".

24. Donahue, "Is Title VII Efficient?".

25. John Donahue and James Heckman, "Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks," University of Toronto Law and Economics Workshop Paper, (October 9, 1991); *see also* Donahue and Heckman, "Re-evaluating Federal Civil Rights Policy," 79 *Georgetown Law Journal* 1713 (1991).

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49. *See* Michael H. Gottesman, "Twelve Topics to Consider Before Opting for Racial Quotas," 79 *Georgetown Law Journal* 1737 (1991).

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51. *See* David Strauss, "The Myth of Colorblindness," *Supreme Court Review* 99 (1986).

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54. This is also broadly the position that Epstein takes with respect to private sector employees, although he would make such programmes totally voluntary and unconstrained by legal norms: Epstein, "Forbidden Grounds," chap. 20.

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56. *See* comments on Strauss, ibid. by Gottesman, "Twelve Topics"; Mary Becker "Needed in the Nineties"; and Jerry Mashaw, "Implementing Quotas," 70 *Georgetown Law Journal* 1769 (1991).

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